NO. 82-6035

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

MANUEL C. QUINTANA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether The Interpretation By The Virginia Supreme Court Of The Virginia Capital Murder Statute Raises A Federal Constitutional Question.

II. Whether The "Dangerousness Predicate" May Be Based On Evidence Other Than Convictions For A Crime.

III. Whether The State Court's Application Of A Procedural Bar To Review Of A Jury's Verdict Form Violates The Petitioner's Due Process Rights.

IV. Whether The State's Application Of A Procedural Bar To Witherspoon Objections Violates The Petitioner's Right To A Fair And Impartial Trial.

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JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved in the instant case are set out in the petition for a writ of certiorari previously filed with this Court.

STATEMENT OF THE CASE

The Petitioner was convicted in the Circuit Court of Arlington County on August 4, 1981, in Commonwealth v. Manuel Quintana, Criminal No. C-17450. A copy of that conviction order is appended to the petition for certiorari at App. A.

The judgment of the Supreme Court of Virginia affirming the Petitioner's conviction was entered on September 9, 1982 in Quintana v. Commonwealth, Record No. 811845, which is found at App. B. of the petition for certiorari. This opinion is also reported at 295 S.E.2d 643. Subsequent to the Virginia Supreme Court's affirmance of the Petitioner's conviction, the Petitioner filed a petition for rehearing which was denied without opinion by an order dated October 15, 1982.

STATEMENT OF FACTS

On March 19, 1981, the deceased, Ofelia Quintero, age 72, was found dead in her apartment. There had been no forced entry, or signs of a struggle. The victim lay in a pool of blood in the kitchen; there were spatters of blood on the radiator near the body. The deceased had received four blows to the right side of the head; the skull was fractured and exposed. There were three blows to the left side of the head, six tearing lacerations on the scalp on the back of the head, and a large area of contusion on the back of the neck. Crescent-shaped bruises were on the back of the chest and shoulder blades and scrapes were found on the back of the left hand. The skull was badly damaged and pushed into the brain. There were a total of thirteen discreet wounds to the head (one consistent with a fall to the floor), five discreet wounds to the lower back from the neck down. The number of wounds on the back of the neck could not be determined. The cause of death was multiple blunt-force entry trauma, with skull fractures and a cerebral brain injury or trauma. All but two of the wounds to the head would have been fatal. The time of death could have been as early as 8:00 a.m. or as late as 2:30 p.m. The murder weapon was consistent with a hammer. Blood and hair found on a hammer at the scene was consistent with that of the victim.

The victim's son, Nelson Echemendia, lived in the apartment with his mother. He left for work at 6:30 a.m., and his mother was alive, and the apartment was neat and orderly. On his return, many items were missing and the apartment was in disarray, clothes were scattered. A wallet containing approximately $1,000 was taken (mostly in twenty-dollar bills). A form belong to Echemendia was kept in the wallet. Nelson Echemendia testified that he knew the Petitioner. Petitioner had visited his apartment in the past on February 3. The Petitioner had not previously handled the camera in the apartment, and the water jug on the table was usually kept in the refrigerator.

The decedent usually served coffee to visitors in small cups. On the day of the murder, coffee was on the stove and cups were on the counter. A dining room chair was moved into the kitchen. The Petitioner knew where the hammer (murder weapon) was kept and that Echemendia and the deceased were saving for a trip. Other people knew Echemendia had money.

The Petitioner's fingerprints were found on the camera and the water jug. These fingerprints were recent.

The Petitioner was released from jail in Fairfax on March 18, 1981, at 5:00 p.m. He only had fifteen cents. The Petitioner was wearing a three-piece suit he had stolen from Humberto Rodriguez. The Petitioner wore the suit on the day of the murder. The suit had blood on a sleeve and on the pants below the knee consistent with the blood of the deceased.

On March 19, the Petitioner bought a car for $350.00 in cash, paid for in twenty-dollar bills. The Petitioner was wearing a hat similar to the one stolen at the crime scene on the day he bought this automobile. The Petitioner made other purchases on the day of the murder and the day thereafter. The Petitioner's wallet contained over $160.00.

The Petitioner went to the Clerk's Office in Fairfax on March 19, 1981, at approximately 1:30 p.m., the day of the murder. The Petitioner stated to the Deputy Clerk, Carman Salgado, that he saw a friend injured (older lady) at the bottom of some stairs. She had some gashes in her head. The Petitioner had blood on his shirt.

The Petitioner was thereafter arrested and his automobile seized. The automobile contained items taken from the deceased's apartment which were identified by Echemendia at trial. The form which Echemendia kept in the wallet was found in the Petitioner's automobile.

In addition to the foregoing Statement of Facts, the Respondent relies on the Statement of Facts found in the Slip Opinion of the Virginia Supreme Court which is annexed to the Petition for a Writ of Certiorari. See Slip Opinion 4-11.

REASONS FOR DENYING THE WRIT

I. The interpretation of Virginia Code § 18.2-31(d) is a matter of state law and no federal constitutional question is presented.

The Petitioner has argued that Virginia Code § 18.2-31(d) is not applicable to his conduct in this case because he did not pre-arm himself prior to going into the victim's apartment and murdering said victim. He argues that the language is vague and thus the death penalty should not be imposed under these circumstances. The Commonwealth argues that the statutory interpretation by the Virginia Supreme Court is dispositive. The definition of a deadly weapon had long been defined prior to the enactment of § 18.2-31(d). See Slip Opinion at p. 8, annexed to the Petition for Certiorari. The Virginia Supreme Court cited two prior cases defining a deadly weapon. Floyd v. Commonwealth, 191 Va. 674, 62 S.E.2d 6 (1950); and Pannell v. Commonwealth, 185 Va. 244, 38 S.E.2d 457 (1946). These definitions were adhered to in cases decided after enactment of § 18.2-31(d). Pritchard v. Commonwealth, 219 Va. 27, 252 S.E.2d 352 (1979); and Cox v. Commonwealth, 218 Va. 689, 240 S.E.2d 524 (1978).

In construing the statute as to when one must be armed, certainly it is not an unreasonable interpretation that this means at any time prior to the criminal act. Indeed, the Supreme Court's statement that "a person is criminally armed from the moment he *seizes a weapon with intent to use it for a criminal purpose*" (Slip Opinion at page 8) is a reasonable construction of the statute and therefore not unconstitutional as applied to the Petitioner. This Court has long held that the Supreme Court of the United States is bound by the state interpretations of its own statute:

> We are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether evidence supports the findings of the state court.

Garner v. Louisiana, 368 U.S. 157, 166 (1961).

In Gryger v. Burk, 334 U.S. 728, 731 (1948), this Court said:

> We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

See also Whalen v. United States, 445 U.S. 684 (1980); Gooding v. Wilson, 405 U.S. 518 (1972).

In Mullaney v. Wilbur, 421 U.S. 684, 685 n. 11 (1975), the court found that a federal court may not review a state court's interpretation of its own statute unless it is an obvious subterfuge to evade consideration of a federal issue. There has been no allegation that the Virginia Supreme Court has attempted to evade any constitutional issue.

In the case at bar the facts show that the Petitioner went to the deceased's apartment and while there armed himself with a hammer and murdered the deceased during the commission of a robbery. Whether the Petitioner formed the intent to commit murder prior to entering the apartment is not a constitutional question. It is clear that the Petitioner armed himself with a deadly weapon prior to his committing the murder and the robbery. Whether the murder occurred prior to the robbery or immediately thereafter is of no significance. Both acts were committed contemporaneously, and, therefore, Petitioner's argument is without merit.

It should be noted that this claim was raised in the state court only in the context of being violative of state law and the state Constitution. Petitioner never asserted below a violation of the Federal Constitution in this regard. This is a jurisdictional prerequisite. Cardinale v. Louisiana, 394 U.S. 437 (1969).

II. ADMISSIBILITY OF EVIDENCE AT THE PENALTY PHASE IS A MATTER OF STATE LAW.

After the Petitioner was found guilty, evidence was presented at the sentencing stage to show that the Petitioner was a continuing threat to society. Padro Castro, an inmate with the Petitioner, testified that the Petitioner admitted to a prior killing by cutting a man's throat in a Cuban jail. The Petitioner also admitted to Castro that he had committed rape in Cuba. The Petitioner told Castro that he was going to carry off again a girl from school by telling them that their mother was sick. Castro testified that the Petitioner showed no remorse for killing in Cuba. The Petitioner also stated to Castro that he would grab the man with four children when he was released.

The Petitioner's statements to Castro were corroborated by Caunabot Saurez Del Sol about the killing in Cuba. The Petitioner's police record was unavailable.

At the sentencing stage before the judge, it was learned that the Petitioner had made some knives in jail, and had tied some jail uniforms together. Section 19.2-264.4(b), in pertinent part, provides:

> Evidence which may be admissible, subject to the rules of evidence regarding admissibility may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.

The sentence stage in the capital murder case is provided so that the jury can consider all pertinent evidence relating to Petitioner's background and history on aggravation and continuing threat to society prior to imposing the death penalty. The evidence complained of by the Petitioner, it is submitted, sheds light on the Petitioner's prior history. In Jurek v. Texas, 428 U.S. 262 (1976), the Court stated:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

428 U.S. at 276.

The Commonwealth argues that the evidence to be admitted at the sentencing stage should be left to the trial court's sound judicial

discretion. This Court recognized this fact in United States v. Grayson, 438 U.S. 41 (1978):

> [A] sentencing judge is not limited to the often far ranging material compiled in a pre-sentence report. Before making the sentencing determination, a judge may appropriately conduct an inquiry broad in scope, largely limited either as to the kind of information he may consider, or the source from which it may come. 438 U.S. 50. ... There the court permitted the sentencing judge to consider the offender's history of prior antisocial conduct, including burglaries for which he had not been duly convicted. This it did despite the risk that the judge might use his knowledge of the defendant's prior crimes for an improper purpose.

438 U.S. at 64. See also Williams v. New York, 337 U.S. 241, 244-246 (1949). The Commonwealth argues that the due process issue at sentencing is whether a defendant disputes the information he must be given a chance to rebut it or comment on it. United States v. Barnett, 587 F.2d 252, 259 (5th Cir. 1979); United States v. Yates, 554 F.2d 342 (7th Cir. 1977). In the case at bar, the Petitioner was given full opportunity to rebut any evidence presented by the Commonwealth.

The Petitioner's argument that the evidence was hearsay and no formal conviction order was presented is not determinative. The evidence was admissible as evidence against penal interests as decided by the Virginia Supreme Court. See Slip Opinion at page 17. The Commonwealth argues, therefore, that this evidence was fully admissible and was reliable and properly admitted under state law. This Court has held that the admissibility of evidence is a matter of state law and therefore not a federal question. See Moore v. Illinois, 408 U.S. 706 (1972).

The practice of admitting said evidence is consistent with that practice in other jurisdictions. See United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979)(evidence of prior crime admitted even though defendant had been acquitted); United States v. Benton, 637 F.2d 1052, 1060 (5th Cir. 1981)(co-defendant's

statement implicating himself and defendant in another crime); United States v. Hodges, 556 F.2d 366 (5th Cir. 1977)(defendant's statement to another concerning prior robbery); Milton v. State, 599 S.W.2d 824 (Tex. Ct. Crim. App. 1980)(unadjudicated prior robberies); People v. Siefke, 421 N.E.2d 1081, 1083 (Ill. App. 1981)(victim of another prior unadjudicated crime); Jackson v. State, 426 N.E.2d 685, 689 (Ind. 1981)(evidence of a prior crime without conviction); United States v. Jackson, 649 F.2d 967 (3d Cir. 1981)(prior criminal complaint); Wilder v. State, 583 S.W.2d 349 (Tex. Ct. Crim. App. 1979)(prior crime which shed light on deliberateness and future criminal conduct); and People v. Hillery, 423 P.2d 208 (Cal. 1967)(evidence of a prior crime upon which the defendant had not been convicted).

Because the sentencing proceeding in a capital case is wide-ranging in scope and the issue is whether or not the Petitioner poses a future threat to society, evidence of prior crimes is admissible whether any conviction therefor have been obtained.

Again it should be noted that this claim was raised in the state court only in the context of being violative of state law and procedure. Petitioner never raised this issue below as being in violation of the Federal Constitution. This is a jurisdictional prerequisite. Cardinale v. Louisiana, supra.

III. THE VIRGINIA SUPREME COURT'S APPLICATION OF A PROCEDURAL BAR TO THE VERDICT FORM PRECLUDES REVIEW IN THIS COURT.

The Commonwealth argues that the issue before the Court in this instance was not properly raised in the trial court, nor was it properly raised in the court below. Consequently, the Virginia Supreme Court applied a procedural rule, Rule 5:21 of the Rules of the Virginia Supreme Court and declined to review this assignment of error.

It is a jurisdictional requirement that the federal question which this Court is asked to consider be properly raised in the

state court proceeding. Godchaux Company v. Estopinal, 251 U.S. 179, 181 (1919); and Beck v. Washington, 369 U.S. 541, 550 (1962). See also Amalgamated Food Employees' Union v. Loganvalley Plaza, 391 U.S. 308, 334 (dissent) (1968). See also Cardinale v. Louisiana, supra.

A state procedural rule which forbids the raising of federal questions at late stages in a case is a valid exercise of state power. Williams v. Georgia, 349 U.S. 375, 382-383 (1955); and Wainwright v. Sykes, 433 U.S. 72 (1977). In Henry v. Mississippi, 397 U.S. 443, 446 (1965), this Court held:

> It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds even where those judgments also decide federal questions.

Not only did the Petitioner fail to object in the trial court as to the verdict form, he also affirmatively ratified the form prior to the jury's verdict and after the verdict was rendered by the jury. See Slip Opinion of the Virginia Supreme Court, page 17.

The Commonwealth notes that the instructions given to the jury could easily be interpreted that if the jury did not find beyond a reasonable doubt both alternatives, then they must give the Petitioner life imprisonment. The transcript of trial, at page 1461-1462, reveals the instructions to the jury. On page 1462 of the transcript, at line 14-17, the Court instructed the jury as follows:

> If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

Certainly this could be interpreted that the trial court was instructing the jury that both alternatives must be found beyond a reasonable doubt prior to the return of a sentence of death.

Assuming but not conceding the jury form is in any way defective, the Commonwealth argues that the verdict returned by the jury was proper. This Court found in Stromberg v. California, 283 U.S. 359, 367-368 (1931), that where a general verdict is based on three alternatives, the failure of one alternative vitiates

the jury verdict. In the case at bar, Petitioner argues that because it is unclear which aggravating circumstance the jury found, that the death penalty should be set aside. However, the Commonwealth argues that the Petitioner must show which predicate is invalid. The evidence adduced in the Petitioner's case at the penalty stage proved beyond a reasonable doubt that both aggravating factors were present. Therefore the death penalty should stand unless the Petitioner can show that one of the factors is defective. This same result obtained in Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981), cert. denied, ____ U.S. ____ (Record No. 81-6151 March 2, 1982):

> The appellant argues that since the jury found the aggravating circumstance set forth in division nine above in the words of the statute, that is, a finding connected by the conjunction 'or,' this in itself indicates that the jury did not make up their minds that the aggravating circumstances existed beyond a reasonable doubt. However, the jury's returning the aggravating circumstance is sufficient when evidence supports such a finding.

284 S.E.2d at 396.

In the case at bar, there is no question that the jury verdicts were supported by the evidence. Therefore, there is no merit to the Petitioner's complaint.

IV. WHETHER THE PROSPECTIVE JURORS WERE IMPROPERLY AND UNCONSTITUTIONALLY SELECTED IN VIOLATION OF WITHERSPOON IS NOT PROPERLY BEFORE THIS COURT.

The Petitioner has alleged that jurors were excluded from the jury panel which decided his case improperly, in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Virginia Supreme Court applied a procedural bar to noticing this error in the Virginia Supreme Court because the Petitioner had failed to object at trial which violated Rule 5:21 of the Rules of the Virginia Supreme Court. The Commonwealth argues that the Petitioner's failure to properly preserve his constitutional claim for review defeats jurisdiction in this Court. See Godchaux

Company v. Estopinel, supra; Beck v. Washington, supra; and Amalgamated Food Employees Union v. Logan Valley Plaza, supra. Indeed, the Virginia Supreme Court's denial of this claim based on an independent state ground has been held by this Court to defeat jurisdiction in a petition for certiorari. See Henry v. Mississippi, supra.

To allow the Petitioner to have the merits of this claim reviewed by the Virginia Supreme Court or this Court would be contrary to the teachings of Wainwright v. Sykes, 433 U.S. 72 (1977). In Sykes, this Court required that constitutional claims must be preserved in accordance with the state procedural law or they are not cognizable in a petition for a writ of habeas corpus. This rule is to prevent "sandbagging" by defense counsel who wait until it is too late for the trial court to correct any error and then interpose objection. There is adequate bases for the procedural rule, and this Court should decline jurisdiction. The cases cited by the Petitioner on brief where the Witherspoon issue was raised for the first time in a petition for certiorari are not dispositive. Most of the trials in those cases occurred prior to the decision in Witherspoon, and all of those cases were decided prior to this Court's holding in Wainwright v. Sykes.

Failure to object to jurors under Witherspoon is a bar to review. See Bass v. State, 622 S.W.2d 101, 108 (Texas Ct. Crim. App.), cert. denied, ____ U.S. ____, 72 L.Ed.2d 491 (1981); see also People v. Haskett, 30 Cal.3d 841, 180 Cal.Rptr. 640, 640 P.2d 776, 778 (1982); White v. State, 629 S.W.2d 701, 705 (Texas Ct. Crim. App.), cert. denied, ____ U.S. ____, 72 L.Ed.2d 457 (1982); see also Hicks v. State, 414 So.2d 1137, 1139 (Fla. App. 1982).

Aside from the jurisdictional arguments, the Commonwealth argues that the jurors who were excluded in this case were properly excluded under the Witherspoon test. The transcript of trial of June 1, 1981 shows that the jurors Michael, Lee, Steigleman,

McKenna and Hickey were properly excluded under the Witherspoon test. The jurors were asked, "In other words, is your objection to the imposition of the death sentence so absolute that you would never under any circumstances agree to impose the sentence of death?" (Tr. p. 44). Each juror answered in the affirmative without equivocation. Jurors Loucas, Gray, Matticole, Gauaze, Welch, Bishop, Kelley and Lesse were likewise unequivocal in their response to the following question: "Because of your views, would you never impose a sentence of death in any case?" (Tr. of June 1, 1981, at 86-87).

Witherspoon does not outlaw the exclusion of jurors who are unalterably opposed to the death penalty. In Witherspoon at 522 n. 21, this Court stated:

> [N]othing we say today bears upon the power of a state to execute a defendant's sentence to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.... (Emphasis original).

Those jurors who were excused in the case at bar in response to the questions presented to them make it clear that they would never impose capital punishment under any circumstances. Certainly this meets the requirement under Witherspoon.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas D. Bagwell, Assistant Attorney General of Virginia, Counsel of Record for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 11th day of February, 1983, three copies of the foregoing Brief for the Respondent in opposition to the grant of a Writ of Certiorari were mailed, first-class postage pre-paid, to Jose R. Recinto, Jr., 2045 North 15th Street, Arlington, Virginia 22201, Counsel of Record for Petitioner.

Thomas D. Bagwell
Assistant Attorney General

objection to the death penalty absolute? That is, because your views or objections to the death penalty, would you refuse to consider its imposition under any circumstances whatsoever?

MR. MELSON: If I may ask each one to respond individually.

Karen Michael?

JUROR MICHAEL: I'm not sure I understand what you are saying.

MR. MELSON: In other words, is your objection to the imposition of the death sentence so absolute that you would never under any circumstances agree to impose a sentence of death?

JUROR MICHAEL: Right.

MR. MELSON: Mrs. Lee?

JUROR LEE: Yes,

MR. MELSON: Mrs. Steigelman?

JUROR STEIGELMAN: Yes.

MR. MELSON: Mr. McKenna?

JUROR MC KENNA: Yes.

MR. MELSON: Mr. Hickey?

JUROR HICKEY: Yes.

MR. MELSON: Now, for those members of the jury who

Yes, m'am?

JUROR GOUAZE: There are two options?

MR. MELSON: Yes, m'am. If the defendant is found guilty, you either have life or the death penalty. Now, would that option make you hesitant to find him guilty of capital murder because you have that option?

Would your views on capital punishment cause any of you to automatically impose life imprisonment as a sentence for murder rather than the death penalty?

Yes, is that Grace Gouaze? Is there anybody else? All right, Ms. Lesse and Mr. Loucas. All right. These are the individuals who responded previously to note their objection to the death penalty.

For those of you who responded affirmatively to the questions concerning objections to the death penalty as well as the juror that just responded to the last question, let me ask you this. Is your objection to the death penalty absolute? In other words, because of your views or objections to the death penalty, would you refuse to consider its imposition in any case regardless of the circumstances?

Let me ask each of you individually. Mr. Loucas?

JUROR LOUCAS: I didn't get the question clear.

MR. MELSON: Because of your views --

JUROR LOUCAS: (Interposing) Yes?

MR. MELSON: (Continuing) -- would you never impose the death sentence in any case?

JUROR LOUCAS: Yes, uh huh.

MR. MELSON: You would not impose it regardless of the circumstances?

JUROR LOUCAS: Yes, I would.

MR. MELSON: Are you saying you would not?

JUROR LOUCAS: Yeah.

MR. MELSON: And Mary Gray?

JUROR GRAY: I would.

MR. MELSON: Perhaps --

JUROR GRAY: (Interposing) Explain it to me a little better to me.

MR. MELSON: I'm asking you whether your objection to the death penalty is absolute?

JUROR GRAY: Yes.

MR. MELSON: In no case would you ever impose the death penalty?

JUROR GRAY: I'm afraid I wouldn't.

MR. MELSON: That's quite all right. I want you to be very candid with us on that subject.

Mrs. Matticole?

JUROR MATTICOLE: I would -- I would not.

MR. MELSON: Would not in any case impose the death penalty?

JUROR MATTICOLE: Yes, I would oppose it. I would not like to judge him and give him the death penalty.

MR. MELSON: I guess I'm having a hard time hearing. Are you saying in any case regardless of the circumstances you would not impose the death sentence?

JUROR MATTICOLE: That's right.

MR. KENDRICK: Your Honor, I didn't get that answer. I'm sorry to interrupt Mr. Melson's examination. I felt like the first time she said her opposition was not absolute.

THE COURT: I gather, Ms. Matticole --

JUROR MATTICOLE: (Interposing) I didn't phrase it properly, but --

THE COURT: (Interposing) You would not impose the death penalty in any case no matter what the evidence would show?

JUROR MATTICOLE: No, I would not.

MR. MELSON: Miss Gouaze, would you have the same or a different answer?

JUROR GOUAZE: I would vote for life imprisonment. I believe that we should have the death penalty in law, but

I'm reluctant to subject somebody to that.

MR. MELSON: So, you would say in every case where you have the option?

JUROR GOUAZE: I would always vote for life imprisonment.

MR. MELSON: You would not vote for the death penalty?

JUROR GOUAZE: No.

MR. MELSON: Ms. Welch?

JUROR WELCH: I would not vote for the death penalty.

MR. MELSON: Under any circumstances?

JUROR WELCH: Right.

MR. MELSON: And Ms. Bishop?

JUROR BISHOP: State the question again?

MR. MELSON: Is your objection to the death penalty so absolute that you would not under any circumstances vote to impose the death penalty?

JUROR BISHOP: No.

MR. MELSON: Can you conceive of some circumstances in which you would impose the death penalty?

JUROR BISHOP: Yes.

MR. MELSON: Mr. Kelly?

JUROR KELLY: I'm totally against the death penalty

under the criminal justice system. I'm totally opposed to it in any situation.

MR. MELSON: Absolutely?

JUROR KELLY: Absolutely.

THE COURT: Does that mean, Mr. Kelly, you would not personally vote to impose it no matter what the circumstances of the case is?

JUROR KELLY: That's right, Your Honor.

MR. MELSON: Ms. Lesse?

JUROR LESSE: My objection is absolute.

MR. MELSON: Your Honor, perhaps we can make our motions now to strike for cause for those jurors, so that I can inquire of the others some other questions. I think we have: Mr. Loucas, Mary Gray, Mrs. Matticole, Mrs. Gouaze, Anne Welch and Matthew Kelly and Miss Lesse.

THE COURT: The motion is granted and the following jurors are excused and I thank you very much, ladies and gentlemen, for remaining with us through this time and you are excused subject to the usual telephone call that tells you when you are next needed. That will be: Mr. Loucas, Miss Gray, Miss Gouaze, Miss Matticole, Miss Lesse, Mr. Kelly and Mrs. Welch. You all are excused.

Now, would the three jurors in the front now take

picture of the left side of the face.

(The photograph previously marked for identification as Commonwealth's Exhibit No. 103 was received in evidence.)

THE COURT: Call the jury, please.

(Whereupon, the jury returned to the jury box.)

THE COURT: Members of the jury, I shall now read you the instructions which will be given you to cover the single determination which the jury must now make, which is what penalty shall be imposed. There are but two instructions and they will as before be given to you in writing to take with you into the jury room. The Commonwealth will have the right to open and close argument on this point as heretofore because the Commonwealth again has the burden of proof beyond a reasonable doubt. After that, we will ask you to retire and deliberate on your verdict as to the penalty, which again must be unanimous.

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the two

following alternatives. Number one, that after consideration of his prior history or the circumstances surrounding the commission of this murder, there is a probability that he would commit criminal acts of violence that would constitute a continuing, serious threat to society or, two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhumane in that it involved deprivity of mind or aggrevated battery to the victim. If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death, or, if you believe from all of the evidence, that the death penalty is not justified, that you shall fix the punishment of the defendant at life imprisonment. If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

An aggrevated battery, in quotation marks, "is an act of violent injury to the person of another which is more than the minimum necessary to accomplish an act of murder. It implies blows which in the light of surrounding circumstances are both more numerous and more violent than would have been necessary to accomplish the killing."